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Supreme Court of the United States

OCTOBER TERM, 1957

COMMERCIAL STEVEDORING CO., INC.,
Petitioner,

against

A/S J. LUDWIG MOWINCKELS REDERI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEO F. HANAN,
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On the Petition.

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A/S J. LUDWIG MOWINCKELS REDERI,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Commercial Stevedoring Co., Inc., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the matter of *A/S J. Ludwig Mowinckels Rederi* v. *Commercial Stevedoring Company, Inc.*

The Opinions of the Courts Below.

The opinion of the District Court dismissing the libel and impleading petition on the merits 1954 A. M. C. 958 (not otherwise reported) is printed in the Record (R.* 58a-62a).

The opinion of the United States Court of Appeals for the Second Circuit, reversing the decision of the Trial Judge on the trial of the merits, is printed in the Record hereto (R. 68a-71a) and is officially reported at 224 F. 2d 437, certiorari denied *A/S J. Ludwig Mowinckels Rederi* v. *Amador*, 350 U. S. 901.

The decision of the District Court on the trial of the action for indemnity, on remand, is printed in the Record (R. 90a-99a) and is officially reported at 146 F. Supp. 617.

* The letter R. followed by numerals indicate pages in the record.

The second decision of the United States Court of Appeals for the Second Circuit, reversing the District Court's dismissal of the claim for indemnity is printed in the appendix hereto. (A*1-A9) and is not as yet officially reported.

Jurisdiction.

The decision and judgment of the Court of Appeals for the Second Circuit sought to be reviewed were entered on June 5, 1958.

Jurisdiction of this Court is found in 28 U. S. Code Sections 1254 (1); 2101 (c) as well as in Rule 19b of the Rules of this Court under this Court's power of supervision over the Federal Judiciary System.

Questions Presented.

Whether a stevedore is under a legal duty to a shipowner to correct, on his own initiative, at his own cost and peril, a condition of unseaworthiness in the stowage of a vessel created by the vessel-owner.

Whether there is a presumption of law that an indemnitor is liable for the negligence of the indemnitee "in the absence of proof to the contrary."

Whether the maritime rule and the common law rule are uniform in their application to contracts of indemnity where the liability of the indemnitor for the negligence of the indemnitee is not clearly and unequivocally expressed.

Whether the unanimous and uncontroverted testimony of competent, reputable witnesses to a material fact (intent, in this case) may be diregarded and the fact found to the contrary without any proof.

Whether the conclusion reached by this Court in *American Stevedores, Inc.* v. *Porello* (1947), 330 U. S. 446, has been overruled by the cases of *Porello* v. *United States*

* The letter A followed by numerals indicate pages in the appendix annexed hereto.

(1950), 94 F. Supp. 952, and *Muratore* v. *United States* (1951), 100 F. Supp. 276 with respect to the interpretation of an ambiguous indemnity clause.

Whether the Court of Appeals properly disregarded the ruling of this Court in *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446, to follow the decision in *Porello* v. *United States*, 2 Cir. 153 F. 2d 605; which was reversed by this Court; and to follow the decisions of the District Courts in *Porello* v. *United States*, 94 F. Supp. 952, and *Muratore* v. *United States*, 100 F. Supp. 276, in construing an identical indemnity clause.

Whether the Court of Appeals properly distinguished and disregarded the ruling of this Court in *Wilburn Boat Co.* v. *Firemen's Fund Insurance Co.*, 348 U. S. 310.

Whether this case should not be considered by this Court in relation to one or more of the following cases in which certiorari has been granted:

Crumady v. *The Joachim Hendrik Fisser*, 249 F. 2d 818;
Skovgaard v. *The Tungus*, 252 F. 2d 14;

and as the inverse of

Ryan Stevedoring Co. v. *Pan-Atlantic Stevedoring Corp.*, 350 U. S. 124; and
Weyerhaeuser Steamship Co. v. *Nacirema Operating Co., Inc.*, 355 U. S. 563.

Statement.

On November 1, 1939, Cosmopolitan Shipping Company, Inc., as general agent for A/S J. Ludwig Mowinckels Rederi (hereinafter called Mowinckels), entered into a stevedoring contract with Commercial Stevedoring Co., Inc. (hereinafter called Commercial). The contract was made in New York City between two companies doing

business and having offices in New York City, and provided for services to be performed in New York City (Respondent Exh. 1, R. 103a).

In March, 1951, the S/S *Ronda* took aboard at Antwerp, in her No. 4 hold, a cargo of steel strips. The steel was stowed on each side of the shaft tunnel, which was 8 feet high, and was stowed to a height in excess of 8 feet so that it was somewhat higher than the top of the shaft tunnel. The *Ronda* proceeded to Havre and there put aboard in the No. 4 hold a cargo of more than 2,000 coils of steel wire. When this stow was completed the top of the stow of coils was 2 or 3 feet higher than the stow of steel strips. It was known when the vessel was at Havre that the steel was to be delivered at New York and that the wire coils were afterwards to be delivered at Baltimore. The stevedore loading in Europe is unknown, but was not petitioner.

The *Ronda* arrived at New York on March 19, 1951, and was docked at Pier 34, Brooklyn, New York to unload the cargo of steel strips. On March 21, 1951, while the cargo of steel strips was being unloaded in the No. 4 lower hold, Manuel Amador, an employee of Commercial and a member of the longshoreman gang operating in No. 4 hold, was injured when he was struck by one or more of some dozen coils which slipped and fell from the top two tiers of the wire stow (First Opinion C. A., R. 66a-67a).

The Court of Appeals for the Second Circuit, in its first opinion (R. 63a-71a), held that since the steel strips were consigned to an earlier port of discharge than the coils, the manner of their discharge was as much a part of the stowage as is the proximity of perishable cargo to cargo that will injure it. The stowage was improper, should the strips be discharged over the tops of the coils, the pile of which inevitably got higher and higher above the remaining strips in the hold as the strips were progressively discharged. Thus, the stowage was only conditionally proper (R. 68a).

Mowinckels was under the duty to perform the condition and obligation of having the steel coils shifted or removed from the square of the hatch before the steel strips were discharged (R. 69a). The cost of properly restowing the cargo was Mowinckels' burden, not petitioner's.

The Court of Appeals held that respondent was negligent because it failed to perform the required condition and because the ship's officer in charge, who knew of all the events and conditions, did not direct, order or request Commercial to shift or remove the wire coils prior to the steel strip cargo being discharged as was his duty and as required by contract (R. 68a-69a).

The petitioner could not shift or remove the wire coils unless ordered or directed to by the shipowner (Mowinckels Exhibit 1, Sec. 9, R. 112a).

The stevedoring contract contained an indemnity clause (Mowinckels Exhibit 1, Sec. 11, R. 113a) and as to that clause the Court of Appeals, on the first appeal, held that "the loss incurred in part from the ship's neglect to provide fit stowage, and there was no language in the indemnity contract covering losses to which the indemnitee's negligence contributed" (R. 71a).

The case was remanded to assess libellant's damages against the shipowner and for trial on the indemnity claim. Libellant's claim was settled and, after trial, the indemnity claim was dismissed, 146 F. Supp. 617.

The Court of Appeals, on the second appeal, granted full indemnity to the shipowner, a tort feasor, pursuant to the indemnification clause involved herein. Thus, the burden of removing and properly restowing the improper stow has been gratuitously passed on to the discharging stevedore.

POINT I.

The Court of Appeals erred in awarding indemnity and its decision is in conflict with the decision of this Court.

The court below in reversing the District Court and awarding indemnity to the shipowner under the contract in question held that its decision in *Porello* v. *United States*, 2 Cir. 153 F. 2d 605 was controlling in view of the similarity of facts. The indemnity clause involved in *Porello* v. *United States*, 153 F. 2d 605 and the indemnity clause in the present case are identical.

In *Porello* v. *United States*, 153 F. 2d 605, the court below, in construing the identical indemnity clause and awarding indemnity to the shipowner, held that the negligent shipowner was entitled to full indemnity because it was reasonable to construe the indemnity clause to cover cases where both the contractor and the shipowner were at fault and that the indemnity clause was inserted in the contract for the purpose of having the stevedore alone bear the loss (153 F. 2d 605, 607-608).

This Court, in *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446, reversed the holding in the *Porello* case as to the interpretation and construction of the indemnity clause and the award of indemnity made pursuant thereto by the Court of Appeals for the Second Circuit as the Court could not answer the contentions of the parties as to the construction to be given the indemnity clause because the indemnity clause, standing alone, was ambiguous (330 U. S. 446, 457). The case was remanded to the District Court for the taking of evidence as to intent to determine the meaning of the clause.

The Court foresaw what might happen on remand and realized that evidence of intent might be unavailable or fail to establish the intent of the parties. In giving instructions

to the District Court for the disposition of the case in such a contingency, this Court said:

> "If the district court interprets the contract not to apply to the facts, of this case, the court would, of course, be free to adjudge the responsibility of the parties under applicable rules of admiralty law" (330 U. S. at 458).

This was a clear mandate to the lower court that if it was unable, because of insufficient or lack of evidence, to ascertain the true meaning of the parties, under the situation presented by the facts, it was to disregard the clause and determine whether or not indemnity should be allowable under applicable admiralty law.

On the remand, *Porello* v. *United States* (D. C. S. D. N. Y.), 94 F. Supp. 952, the District Court did not follow the instructions of this Court. On the remand neither party offered any evidence as to intent or the meaning of the contract. The Court refused to adjudge responsibility of the parties under applicable rules of admiralty law (94 F. Supp. 952, 954). It held that the stevedore had led the court to believe that it would offer evidence as to intent and when it failed to do so then the court construed the meaning of the contract as being in accordance with the previous decision of the Court of Appeals, 2 Cir. 153 F. 2d 605 (which had been reversed by this Court), to the effect that the clause required full indemnification for damages caused in any part by the stevedore's negligence. The *Porello* case was not further appealed.

This error which the District Court originated is now perpetuated by the decision of the Court of Appeals in the case at bar. In the present case, the Court of Appeals approved the District Court's finding herein that all evidence of intent was unpersuasive, and the documentary evidence submitted did not indicate an intent. Assuming the soundness of this finding, the Court of Appeals should have then disposed of the case under applicable admiralty

rules as the instructions in the *American Stevedores, Inc.* case required, 330 U. S. 446, 458. In addition, the Court of Appeals mistakenly interpreted the decision of this Court and assumed that it was bound by the decision to apply so-called admiralty rules in construing and determining the meaning of the contract and that it was barred from applying ordinary and usual rules of construction (A4). It follows, therefore, that the decision of the court below is in direct conflict with this Court's decision in the *Porello* case, 330 U. S. 446, 458.

The District Court held that the State law applied, 146 Supp. 617, 621 and, in doing so, it followed the opinion of this Court in *Wilburn Boat Co.* v. *Firemen's Fund Insurance Co.*, 348 U. S. 310. That case held the warranty clauses of a marine insurance policy, a maritime contract, were to be construed and interpreted by State law for the reason that the application of the State law works no injustice to the principles of uniformity. As in *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446, where it was held an indemnity clause does not determine the nature of a contract, it follows that warranties of a marine insurance policy do not determine the nature of the contract. The concurring opinion of Mr. Justice FRANKFURTER in the *Wilburn* case points out with clarity that the warranties under question did not determine the nature of the policy, but were so localized in scope as to render unnecessary the application of uniform principles. The same is true as to the contract and indemnity clause herein. Since the indemnity clause does not determine the nature of the contract then an interpretation and construction of such a clause according to State law does no violence to the principles of uniformity and for that reason State law should control. Although it is doubtful that a choice between State and Federal admiralty law is at all necessary upon the assumption that a choice must be made reason dictates the selection of State law.

The Court below held that admiralty law applied (A4, A3-9). The Court of Appeals was apparently of the opinion that the decision in *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446 required the application of admiralty law and barred the application of State law when an indemnity clause was to be construed. The Court of Appeals was also of the opinion that the *Wilburn* case did not require the application of State law to the indemnity clause involved herein, because the *Wilburn* case was to be confined solely to insurance matters (A5).

The case of *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446, did not bind the District Court, on remand, to apply admiralty rules in construing or determing the meaning of the clause. It did require the District Court to apply rules of admiralty law only after the District Court found that the contract did not apply to the facts of the case.

An examination of the *Wilburn* case leads to a different conclusion than that of the court below namely, that this Court in its opinion, was carefully fashioning a distinction between things maritime and things local. To the former there must be applied admiralty law consistent with the desirability of uniformity and to the latter there must be applied State law consistent with the historic role of state control over matters where uniformity is not essential.

The Court of Appeals may well have been misled to this view in the belief that there exists a need for uniform application of indemnity rules with relation to stevedoring activities as is illustrated by cases involving the liability of a stevedore for breach of the warranty of workmanlike services, i.e., *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Co.,* 350 U. S. 124; *Weyerhaeuser Steamship Co.* v. *Nacirema,* 355 U. S. 563. These cases do not demonstrate a need for uniformity in connection with the interpretation of indemnity clauses in stevedoring contracts because they

did not involve express clauses previously agreed upon by the contracting parties, but rather involved a warranty which it might be said is read into a stevedoring contract by admiralty law. Such warranties do not prohibit the parties from agreeing as they choose in unrelated matters such as the granting of indemnity. Where private agreements are made to suit the desires and peculiar requirements of the individual contracting parties, there is obviously no need for uniformity since these agreements by their nature are not uniform. The conclusion is inescapable that the interpretation and construction of such private agreements should be left to the states wherein the contract was made. The *Wilburn Boat* case decided no more than this.

The contract involved herein was made in New York between parties having offices and doing business in New York for services to be performed in New York. The accident happened in New York.

The contract provided for local stevedoring services to be performed aboard vessels and also provided for local stevedoring services being performed ashore in connection with the loading and unloading of vessels (Mowinckels Exhibit 1, R. 103a, Sections 7, 8, 9; R. 105a-112a). The stevedore is required to remove and handle cargo from the piles on the pier, pier sheds and from cars. In unloading cargo, it is required to pile the cargo on the pier into pier sheds and cars, piling the same as ordered. In addition, the stevedore is required to sort and store cargo on the pier either in preparation for loading, or after unloading, in preparation for having the cargo removed from the pier.

In *Rich* v. *United States*, 2 Cir., 177 F. 2d 688, an admiralty action, it was held that the rule of indemnity is not exclusively one in admiralty or that of a collision situation.

In view of the mixed and local nature of the stevedoring

contract and the facts involved, the law of New York should have been applied to the contract and when the court below refused to do so, its decision was in conflict with the holding in *Wilburn Boat Co.* v. *Firemen's Fund Insurance Co.*, 348 U. S. 310.

The law of New York should have been applied, as is shown by the following cases: *Gallagher* v. *United States Lines*, 2 Cir. 206 F. 2d 177; certiorari denied, 74 S. Ct. 221; *Jarka Corp.* v. *Hellenic Lines, Ltd.*, 2 Cir. 182 F. 2d 916; *Pierce* v. *Erie R. R. Co.*, 1958 A. M. C. 1142, 1146 (not otherwise reported); *Petition of L. Boyer's Sons Co.*, 2 Cir. 25 F. 2d 602; *Standard Oil Co.* v. *Robins Dry Dock and Repair Co.*, 2 Cir. 32 F. 2d 182; *Bohn* v. *American Export Lines, Inc.* (D. C. S. D. N. Y.), 42 F. Supp. 228; *Barber S/S Lines, Inc.* v. *Quinn Bros, Inc.* (D. C. Mass.), 104 F. Supp. 78.

In *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, this Court, in reversing the New York Court of Appeals, matter of *Red Cross Line* v. *Atlantic Fruit Co.*, 233 N. Y. 373, applied the law of the State of New York in connection with an arbitration clause contained in a charter party, a maritime contract.

Much controversy has arisen in this case as to the choice of New York State or admiralty law applying to the contract. The District Court held that the state law should apply; 146 Fed. Supp. 617, 621. The court below held that admiralty law should apply (A4, A3-9).

The controversy, however, is of no significance because in the particular field involved herein, there is no difference between state and admiralty law. This was recognized by the District Court when Judge EDELSTEIN said: "It is not clear to me that there is a difference between the New York law and the general admiralty rule." 146 F. Supp. 617, 621. Judge CLARK writing for the Court of Appeals stated, "In fact the admiralty and New York rules governing the situation are not totally dissimilar"

(A8, Note 2). An examination of decisional law on the subject fails to show a difference. The New York State decisions have enunciated a well settled rule that an indemnity contract will not be construed to indemnify one against his own negligence unless such an intent is clearly and unequivocally expressed. *Semanchuck* v. *Fifth Avenue*, 290 N. Y. 412; *Thompson-Starrett Co.* v. *Otis Elevator Co.*, 271 N. Y. 36; *Mostyn* v. *Delaware, Lackawanna & Western Railroad Co.*, 2 Cir. 160 F. 2d 15, which decision was followed in *Shamrock Towing Co.* v. *Tully & DiNapoli*, 91 F. Supp. 239, and in *Pierce* v. *Erie R. R. Co.*, 1958 A. M. C. 1142 at 1146, admiralty matters.

The same rule has been applied in a series of admiralty decisions which makes the rule a fully accepted admiralty rule. *Rice et al.* v. *Pennsylvania Railroad Co.*, 2 Cir. 202 F. 2d 861; *Anthony O'Boyle, Inc.* v. *Scow "Louis W. Doyle", et al.*, 2 Cir. 187 F. 2d 872, affirming *Shamrock Towing Co.* v. *Tully & DiNapoli*, 91 F. Supp. 239; *"Zeller No. 14"*, 74 F. Supp. 538; *Pierce* v. *Erie R. R. Co.*, 1958 A. M. C. 1142, 1146.

Further evidence that the judicially created admiralty law fully intended to adopt the State rule is seen by decisions in other branches of maritime undertakings. In *Jordan Inc.* v. *Mayronne Drilling*, 5 Cir. 214 F. 2d 410, a barge charter was involved which contained a provision "The charterer has had the barge inspected and found same to be in first class condition." This language was held not to be sufficiently clear and unequivocal so as to constitute a waiver of the normal warranty of seaworthiness owing under such a charter. To the same effect is the decision of the Fourth Circuit in *Dempsey et al.* v. *Downing et al.*, 11 F. 2d 15. There the court said: "When shipowners contemplate the release of their vessels from liability, as affects the implied warranty of seaworthiness for the service undertaking, they should do so in plain and unequivocal terms." The *Dempsey* case was decided

in 1926 and research discloses no admiralty decision which has varied or altered that rule since. Similarly this Court reenunciated the rule in *Boston Metals Co.* v. *S/S Winding Gulf*, 349 U. S. 122, in which the concurring opinion of Mr. Justice FRANKFURTER stated: "Release from liability clauses generally, and specifically with regard to towage contracts, are not to be applied to alter familiar rules visiting liability upon a tort feasor for the consequences of his negligence unless the clarity of the language used expresses such to be the understanding of the contracting parties" (349 U. S. 122 at 123, 124).

An examination of the decision of the District Court on the remand in *Porello* v. *United States*, 94 F. Supp. 952, shows that another error was committed that since has been perpetuated by the Court of Appeals in the present case. Instead of affixing to the indemnity clause in the *Porello* case the meaning that should have been accorded under state and admiralty law, the District Court attached to it the meaning which the Court of Appeals had previously given it, *Porello* v. *United States*, 153 F. 2d 605, 607-608 and which was held to be in error, 330 U. S. 446. Had the District Court applied the applicable state or admiralty law, the conclusion and result would have been necessarily different. As has been pointed out, state law and admiralty law requires that an intent to be indemnified against one's own negligence must be expressed beyond the peradventure of a doubt. Obviously, such an intention was not expressed in an ambiguous clause. The inescapable conclusion is, therefore, that a claim to indemnify must fail here as it should have failed in *Porello* v. *United States*, 94 F. Supp. 952 and *Muratore* v. *United States*, 100 F. Supp. 276.

It is significant to note that the Court of Appeals, in the present case, held the mistaken view that indemnity was allowable under such a clause as is involved herein, where there was a joint participation in the fault, if a contrary intent was not expressed or proven (A8). This view

was possibly brought about by a misapprehension of the New York State law as well as the applicable admiralty law. The law is plain, that the conditions contained in the writing must be clear and unequivocal for indemnity to be granted where there has been joint participation in the wrong. This is entirely different than saying indemnity in such a case must be allowed under an ambiguous writing unless there is probative evidence of a contrary intent. The important aspect of the state and admiralty law is that the writing itself must be clear and unequivocal as to the intent to indemnify one against its negligence in whole or in part. In addition, the aforesaid mistaken view of the Court of Appeals would tend to establish a dangerous presumption of law that an indemnitor is liable for the negligence of his indemnitee "in the absence of proof to the contrary". A similarly untenable presumption of law is implicit in the finding of the court below that Commercial was under a "duty" to remove, shift and restow the wire cargo without orders to do so from the shipowner (R. 152a).

The court below committed error when it held that its decision in *Porello* v. *United States*, 2 Cir. 153 F. 2d 605, reversed in *American Stevedores Inc.* v. *Porello*, 330 U. S. 446, and the decisions of the District Courts in *Porello* v. *United States*, 94 F. Supp. 952 and which was followed in *Muratore* v. *United States*, 100 F. Supp. 276 were controlling despite the ruling and orders of this Court in *American Stevedores Inc.* v. *Porello*, 330 U. S. 446. The decision herein is further in conflict with the ruling of this Court in *Wilburn Boat Co.* v. *Firemen's Fund Insurance Co.*, 348 U. S. 310. It is also in conflict with *Gallagher* v. *United States Lines*, 2 Cir. 206 F. 2d 177; cert. den. 74 S. Ct. 221 and *Jarka Corp.* v. *Hellenic Lines, Ltd.*, 2 Cir. 182 F. 2d 916.

POINT II.

The Court of Appeals erred in failing to find that it was the intent and meaning of the parties to the contract that Commercial would only indemnify Mowinckels when Commercial was solely negligent.

The application of state or admiralty law to the construction of the indemnity clause in question shows the Court of Appeals opinion to have been erroneous. However, another separate and distinct error was committed by the court below in its reasoning and conclusion. The District Court and the Court of Appeals were of the view that there was no probative evidence of intent or meaning of the parties to the contract. In this respect, a serious error was committed.

Despite the evidence that there was no intent to indemnify, the Court of Appeals arrived at the contrary conclusion that it was intended to indemnify by reason of the terms of the ambiguous indemnity clause, standing alone.

The Circuit Court was not justified in construing the testimony of Messrs. Bartlett (by deposition) (R. 73a), and Hudson (R. 82a), that there was no such intent to indemnify, as direct evidence that there was an intent on Commercial's part to indemnify Mowinckels against the latter's negligence because when the testimony of these men and the other provisions of the contract were disregarded, the clause remained "ambiguous".

The testimony of Bartlett and Hudson was not controverted by direct evidence nor by any legitimate inference from the evidence and was not opposed to the probabilities nor in its nature surprising or suspicious. Hence there is no reason for denying to it conclusive[illegible] (*Chesapeake & Ohio Ry. Co.* v. *Martin, et al.* [illegible] S. 209, 218.) See also *International Shoe Co.* v. [illegible]*al Trade Commission*, 280 U. S. 291, 299.

A reading of the entire contract also shows the true meaning and intent of the parties with respect to the entire issue of indemnity.

The indemnity clause in question is set forth in Sec. 11 of the contract (R. 113a). This clause provides for indemnity when the loss and damage were caused "through the negligence or fault of the Stevedore, his employees and servants."

In Sec. 9 of the contract (R. 112a) it is provided, in part, as follows:

> "The Stevedore, when directed by the General Agent or its authorized agent, shall clean holds, cooper cargo, shift cargo on the vessel, the necessity for which is not occasioned by any negligence of the Stevedore, * * *".

It is to be noted that in connection with this provision the words "any negligence of the Stevedore" are used. We submit that the use of the words "any negligence" is most significant as to the intent of the parties under the indemnity clause, where they use the words "the negligence or fault of the Stevedore." When the parties used the words "any negligence" it is quite clear that the stevedore would have to perform the services provided for in Sec. 9, even though some other party was also negligent and that the stevedore, in order to escape the penalty set forth in Sec. 9 of the contract, would have to show that it was free of "any negligence" irrespective of the negligence of any other party. The same cannot be said with respect to the words used in Sec. 11 of the contract, which section is the indemnity clause.

On the trial of the indemnity claim Mowinckels contended and offered evidence to show that by reason of Sec. 12 of the contract (R. 113a-114a), which section provides for the insurance to be obtained and furnished by Commercial, that this section and the compensation policy obtained pursuant to Sec. 12 was evidence of the intent of

Commercial to indemnify Mowinckels for the latter's negligence whether or not its negligence, in whole or in part, caused an injury or loss. Mowinckels claimed that pursuant to the provisions for coverage in the workmen's compensation policy, alone, it was clear that Commercial intended to indemnify Mowinckels when the latter's negligence caused and contributed to an injury.

After the trial had been concluded and briefs submitted, Mowinckels apparently discovered that it was in error because of the terms and conditions of the workmen's compensation policy itself and the decision in the case of *Lo Bue* v. *United States*, 2 Cir. 188 F. 2d 800.

Mowinckels was then permitted to reopen the trial and offered in evidence the comprehensive general liability policy which Commercial had obtained in 1951. This policy covered the contractual liability of Commercial with respect to all contracts declared under the policy or covered by endorsement. As this policy did not cover or mention the contract between Mowinckels and Commercial the District Court correctly held that it failed to prove intent, as contended by Mowinckels (R. 98a-99a) (146 F. Supp. 617, 622-623).

The holding of the District Court as to the coverage of the comprehensive general liability policy was correct. *Union Paving Co.* v. *Thomas*, 3 Cir. 186 F. 2d 172. In that action the same form of comprehensive general liability policy was involved.

A reading of Sec. 12 of the stevedoring contract shows that the insurance coverage was considered in detail and it was the intent to provide for all liabilities, between the parties, contemplated by the stevedoring contract. If it was the intent of the parties to have Mowinckels protected and indemnified against its own negligence, this certainly would have been provided for in the insurance clause. That no such provision was set forth in the insurance clause shows that it was the intent of the parties that

Commercial was only obligated to indemnify or protect Mowinckels when Commercial was solely negligent with respect to any injury or accident.

If the shipowner had intended to be fully indemnified when it was negligent, in whole or in part, it would have required the procurement of a policy to cover contractual liability for indemnity and that it be furnished with a certificate of insurance, as required by Sec. 12 of the contract showing that such protection had been obtained. *Amendola* v. *United States*, 74 F. Supp. 488, 492.

In the dissenting opinion of Mr. Justice BLACK in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, it is stated at pages 142-143, as follows:

> "A genuine contract as distinguished from a liability imposed by law, sometimes called a 'quasi-contract', requires mutual agreement of the parties. It is for this reason that the courts have frequently said that the cardinal rule in the interpretation of contracts is that the intention of the parties should be ascertained and enforced. And courts do not ordinarily stretch language in order to find that one person has agreed to indemnify another when the latter negligently hurts someone. Special caution should be used in construing contracts so as to impose indemnity liability on companies not engaged in the business of writing indemnity insurance."

The Court of Appeals in the present case, should not have attempted to determine the intent of the parties to the contract by merely referring to the indemnity clause which, as this Court has held, was ambiguous standing alone. It should have accepted the testimony of Bartlett and Hudson, examined the entire contract and taken into consideration the use of the words "the negligence" and the words "any negligence". It should also have taken into consideration the insurance clause wherein all of the intended liabilities as between the parties to the contract were covered by insurance. In this connection, it is to be

noted that the parties provided for state workmen's compensation as the stevedoring contract was a mixed contract. It is quite clear that in view of the mixed nature of the contract, the parties did not intend to have the admiralty rules applied to any question of indemnity in connection with an injury caused during the course of the work to be performed on the pier. The quotation above shows that the court below failed to use caution and committed error when it held that its construction of a similar indemnity clause, as set forth in *Porello* v. *United States*, 153 F. 2d 605, is applicable to the present case especially in the light of the decision in *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446.

The testimony, a reading of the entire contract and the actions of the parties as to obtaining and not obtaining insurance policies shows intent as contended by Commercial.

POINT III.

Mowinckels is not entitled to contractual indemnity.

Mowinckels, the shipowner, did not at any time, give an order, direction, make a request of the stevedore or contract with the stevedore to shift or remove the wire coil cargo, so as to make a conditionally proper stow a proper one. Had such an order been given, petitioner would have to be paid for the extra work. The District Court properly held that no promise could be implied upon the part of the stevedore to gratuitously render the conditionally proper stow actually proper and that to imply such a promise would mean that the stevedore had agreed for no compensation to protect the shipowner against liability arising out of the shipowner's own negligence. It further correctly held that in the absence of an expressed promise, such a contractual implication would be utterly unreasonable. *American Mutual Liability Insurance Co.* v.

Matthews, 2 Cir. 182 F. 2d 322, 324; *Slattery* v. *Marra Bros.*, 2 Cir. 186 F. 2d 134, 139, cert. den. 341 U. S. 915, 95 L. Ed. 1351.

In the present case, such an implication was precluded by the terms and conditions of the stevedoring contract. The stevedore could not shift or remove cargo unless ordered or directed to by the shipowner (Mowinckels Exhibit 1, Section 9, R. 112a). But the court below erroneously holds that Commercial was under a "duty" to do so (R. 152a).

Although the Court of Appeals did not reach this question, in view of its disposition of the case (A9), Mowinckels has contended that it is entitled to contractual indemnity under the decisions of this Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124 and *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563.

In the *Ryan* case, the facts were entirely different than those in the present case. In that case, the stevedoring company not only loaded the vessel at one port, but discharged the same vessel at another port. It was during the course of the discharge that an employee of the stevedoring company was injured because of the improper stowage of the cargo by the stevedores at the port of loading. The stevedoring company was held responsible because the cargo as finally stowed was improperly stowed. As a result, it failed to perform its contract with the owner. The end purpose or product of the contract was to have the cargo properly stowed when all of the cargo was on board. As it was pointed out in the opinion, the stevedoring agreement necessarily included the stevedore's obligation first, to stow the cargo and, secondly, to stow the cargo properly and safely, 350 U. S. 124, 133. That it was the failure of the stevedoring company to accomplish the end result or product of the contract which gave rise to the right of indemnity is shown by the fact that the stevedore's warranty to ac-

complish the end result or product of the contract "was comparable to a manufacturer's warranty of the soundness of its manufactured product", 350 U. S. 124, 134. This does not mean that any act of negligence occurring during the performance of the contract or the manufacturing of a product will give rise to a breach of warranty or contract entitling a tort feasor to full indemnification.

In the *Ryan* case, the shipowner did pass onto the stevedoring company the breach of the shipowner's non-delegable duty of seaworthiness when it contracted with the stevedoring company to stow cargo properly, the end purpose of the contract. Such is not the situation in the present case, as the shipowner did not, at any time, contract with the stevedore to have the stevedore shift or remove the wire coil cargo in order to make a conditionally proper stow a proper one. The shipowner was held to be a tort feasor because it did not perform its duty either by contracting with the stevedore or taking some other means, to have the wire coil cargo shifted or removed in order to make an unseaworthy ship a seaworthy one. The stevedore, in the present case, had nothing to do with the stowage of the cargo at the loading port, nor the decision to discharge the New York cargo before discharging the Baltimore cargo. These were the sole acts of the shipowner. In the present case, the stevedore did not, in any way, create the conditionally proper stow, nor did it cause the continuance of such improper and unseaworthy condition. It was the negligence of the shipowner and its second officer which gave rise to the improper and dangerous stowage when they failed to meet the self-imposed conditions resulting from first, the election at Havre to discharge the New York cargo before discharging the Baltimore cargo and, secondly, when they elected at New York to discharge the New York cargo without arranging for shifting or discharge of the Baltimore cargo before the New York cargo of steel strips was discharged.

In the *Ryan* case, there was no finding of knowledge of the improper stowage or negligence on the part of the shipowner, the ship's agents or the ship's officers. In that case, it was held that the shipowner was only guilty of a failure to discover the improper stowage, 350 U. S. 124, 134-135. In the present case, the shipowner, Mowinckels, is guilty of more than a mere failure to discover. It knowingly created a conditionally proper stow and negligently caused that conditional condition to continue and to develop into a dangerous condition.

Distinction between the two cases is shown in another manner. In the *Ryan* case, it is obvious that the shipowner did not participate in the creation of an improper stow as it was the sole act of the stevedore. In the present case, the reverse is true, because Commercial did not participate in the creation of the conditionally proper stow, nor did it cause to continue the existence of the conditionally proper stow which eventually became improper and dangerous because of the failure of the shipowner to act. Creation of the improper and dangerous stow was the sole and individual act of Mowinckels, the shipowner.

The purpose or end product of the contract entered into between Mowinckels and Commercial on the occasion involved was for Commercial first to stow the discharged cargo on the dock and secondly, to stow it properly. The purpose or end result of the contract, as contemplated by the parties, in no way caused or contributed to the injury involved herein as it did in the *Ryan* case. When the stevedoring contract was entered into, it was not the intent, nor was it contemplated, that Commercial was to guarantee Mowinckels that no act of negligence of any kind would occur, and that if any act of negligence of the longshoremen did occur, that this would give rise to a breach of warranty and a right of indemnity in favor of Mowinckels in any and every respect, irrespective of the nature of the negligent act and irrespective of whether or not Mowinckels was

responsible for the improper stowage and was guilty of negligence in failing to perform the duty which it owed to the libellant and petitioner.

The act of negligence of the stevedore in carrying out the contract, in the present case, was not a breach of contract as would entitle the tort feasor Mowinckels to be indemnified. *Smith* v. *Pan-Atlantic Steamship Corp.* (D. C. E. D. Penn.), 161 F. Supp. 422, affirmed C. A. 3, 254 F. 2d 600; *Hagans* v. *Farrell Lines, Inc.*, 3 Cir. 237 F. 2d 477.

Knowledge of or acquiescence to the existence of a defective appliance or an improper condition or a conditionally proper stow by a stevedore may prevent fruition of the right to indemnification, but it does not follow that a burden to indemnify is thereby created. There was not any breach of warranty or contract on the part of Commercial which would give rise to the right of indemnification in favor of Mowinckels when Commercial discharged the cargo in the order and manner it did with the knowledge and consent of Mowinckels, pursuant to the terms of the written contract (Mowinckels Exhibit 1, Section 7, R. 105a-106a). *American Mutual Liability Insurance Co.* v. *Matthews*, 2 Cir. 182 F. 2d 322; *Slattery* v. *Marra Bros.*, 2 Cir. 186 F. 2d 134; *Shamrock Towing Co.* v. *Tully & Di Napoli*, 91 F. Supp. 239, affirmed on opinion of District Court, sub nom; *Anthony O'Boyle Inc.* v. *Scow "Louis W. O'Boyle", et al.*, 2 Cir. 187 F. 2d 872.

In *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563; 2 L. Ed. 2d 491, we have the same situation as aforesaid in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Co.*, 350 U. S. 124. In the *Weyerhaeuser* case, the same stevedore created the condition at one port and then proceeded to work under the conditions which it had created at another port, resulting in an injury to one of its employees.

The obligations of the stevedore, as set forth in the contract, were different than those set forth in the contract involved herein.

In the *Weyerhaeuser* case, it was recognized that even though the stevedores were negligent in the performance of their work, this did not in and of itself warrant the granting of indemnity in favor of the shipowner irrespective of the shipowner's participation in the wrong which caused the injury. When the case was being remanded for trial on the indemnity question, it could not definitely be determined on what basis the jury found that the shipowner was liable. The possibility existed that the shipowner was only guilty of a mere failure to discover, as in the *Ryan* case, and of course, the mere failure to discover the breach of the contract by the stevedore would not prevent indemnity. In the *Weyerhaeuser* case, the following statements were made on this point:

> "If in that regard respondent (stevedore) rendered a substandard performance which foreseeingly led to petitioner's (shipowner) liability, the latter was entitled to indemnity absent conduct on its part sufficient to preclude recovery".
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> • • • • •
>
> "While the jury found petitioner 'guilty of some act of negligence', that ultimate finding might have been predicated, inter alia, on a failure of petitioner to remove the shelter when the ship left New York, or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition. Although any of these possibilities could provide Connolly a basis of recovery, at least the latter would not, under Ryan, prevent recovery by petitioner in the third-party action. 350 U. S. at 134, 135."

The above quotations and the opinion as a whole in the *Weyerhaeuser* case shows that even though a stevedore is negligent in performing its work, it does not auto-

matically follow that the shipowner, who is also a tort feasor, is entitled to contractual indemnity. In the present case, it has been held that the shipowner was at fault for creating a stow only conditionally proper and for negligently failing to correct an unsafe condition brought about by its direction to discharge the New York cargo of steel strips without shifting or removing the Baltimore cargo of wire coils. The shipowner actively participated in and caused the unsafe condition, which resulted in libellant's injury.

Mowinckels was required not only to furnish the libellant a vessel with a proper stow, but it was also under obligation to Commercial to furnish that company with a properly stowed cargo (R. 68a). This omission on the part of the shipowner was recognized and established by the Court of Appeals on the first appeal when it held, "but the situation is to be distinguished from one in which the longshoremen were merely negligent in discharging a well stowed cargo" (R. 68a). In the present case, the shipowner did not furnish the stevedoring company with a well stowed cargo.

Mowinckels, as shipowner, was under the duty to furnish a ship with cargo properly stowed and fit in hull and gear (R. 68a). It not only owed this duty to the injured libellant but when it contracted with Commercial to unload cargo, it had the contractual obligation to furnish a stowed cargo unconditionally proper. Mowinckels, before it obligated Commercial to discharge the New York cargo should have taken proper means to perform the required condition, which it could have done very easily by contracting with Commercial to either shift or discharge the Baltimore cargo before starting on the New York cargo. That Mowinckels elected not to perform the required condition and continued the work under its election, having knowledge of all the facts, it did not perform its duty to the injured party nor did it perform its contractual

obligations to Commercial. That Commercial proceeded to perform the contract to discharge as ordered and was required by the shipowner to carry out the contract under improper conditions created by the shipowner precludes the shipowner from contractual indemnity. *Smith v. Pan-Atlantic Steamship Corp.*, 161 F. Supp. 422, affirmed on appeal *Smith* v. *Pan-Atlantic Steamship Corp.*, 3 Cir. 254 F. 2d 600; *Hagans* v. *Farrell Lines, Inc.*, 3 Cir. 237 F. 2d 477.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEO F. HANAN,
Counsel for Petitioner.

HORACE M. GRAY,
On the Petition.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appendix.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 275—October Term, 1957.

(Argued March 25, 1958 Decided June 5, 1958.)

Docket No. 24849

A/S J. LUDWIG MOWINCKELS REDERI,
Petitioner-Appellant,
v.
COMMERCIAL STEVEDORING CO., INC.,
Respondent-Appellee.

Before:

CLARK, Chief Judge,

LUMBARD, Circuit Judge, and DIMOCK, District Judge.

Appeal from the United States District Court for the Southern District of New York, DAVID N. EDELSTEIN, Judge.

Petitioner, A/S J. Ludwig Mowinckels Rederi, appeals from a decision, D. C. S. D. N. Y., 146 F. Supp. 617, and decree dismissing its petition for indemnification from Commercial Stevedoring Co., Inc. Reversed for decree for petitioner.

FRANCIS X. BYRN (James M. Estabrook, of Haight, Gardner, Poor & Havens, New York City, on the brief), for petitioner-appellant.

LEO F. HANAN, New York City (Thomas F. Keane, Brooklyn, N. Y., and Horace M. Gray, New York City, on the brief), for respondent-appellee.

CLARK, Chief Judge:

This is an appeal from a decision, D. C. S. D. N. Y., 146 F. Supp. 617, and decree dismissing the petition of A/S J. Ludwig Mowinckels Rederi, which sought indemnification from Commercial Stevedoring Co., Inc., for the amount paid to Manuel Amador, an employee of Commercial, in settlement of his action for personal injuries sustained by him while unloading Mowinckels' ship, the *Ronda*. The major question at issue is whether the District Court correctly interpreted an indemnification clause in the contract between Mowinckels and Commercial under which Commercial undertook to perform all stevedoring operations for Mowinckels at the port of New York.

Amador's libel against Mowinckels was originally dismissed on the merits by the District Court on the ground that Commercial's gross negligence in unloading heavy steel strips was the sole cause of the accident which caused Amador's injuries. On appeal, however, we determined that despite Commercial's negligence Mowinckels was liable to the longshoreman. *Amador* v. *A/S J. Ludwig Mowinckels Rederi*, 2 Cir., 224 F. 2d 437, certiorari denied *A/S J. Ludwig Mowinckels Rederi* v. *Amador*, 350 U. S. 901. The findings of the District Court quoted in that opinion showed that Mowinckels had loaded the cargo in question in such a manner as to make the stow only "conditionally proper," i.e., it was improper unless certain steps were taken upon discharge, and that Commercial, after adequate notice of

the situation, had failed to take the steps necessary to insure safe unloading. But we held nevertheless that Mowinckels could not avoid liability to the longshoreman for injuries caused by this condition simply by delegating the unloading operations to Commercial. We therefore remanded the case to the District Court for a determination of Amador's damages and for an adjudication of Mowinckels' claim for indemnity which had been dismissed by the District Court as moot. On retrial Amador's libel was settled with the approval of Mowinckels and Commercial, and Mowinckels claim for indemnity was dismissed.

The indemnity clause in question provides as follows:

> "The Stevedore (Commercial) performing any service required by this contract shall be responsible for any and all damage or injury to persons and cargo while loading or unloading or otherwise handling or stowing the same and to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars, and carfloats used in connection therewith, through the negligence or fault of the Stevedore, his employees and servants."

The problem here involves the proper interpretation of this clause. Commercial contends that it must be construed strictly to limit liability for indemnification to those situations where its negligence alone is responsible for the accident or injury. And it argues that our decision on the previous appeal, which holds Mowinckels liable for Amador's injuries, negatives the possibility of a finding that its negligence was the sole cause of this accident. This construction of the clause runs counter to our interpretation of an identical indemnity provision in *Porello* v. *United States*, 2 Cir., 153 F. 2d 605, where we held that it required full indemnification even where the indemnitee and indemnitor were joint tort-feasors. On the appeal in that case the Supreme Court held that the clause was ambiguous and reversed the indemnity award and remanded the case to

the District Court to determine the intent of the parties as to the meaning of the provision. *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446. On retrial, however, the stevedoring company chose not to submit evidence of intent, but to rely on the decision of the Supreme Court as a holding that the contract was ambiguous and, in the absence of further evidence, could not be construed. But the District Court properly rejected this interpretation and, evidence of intent being thus lacking, concluded, as had we, that the provision required full indemnification for all damages caused in any part by the stevedore's negligence. *Porello* v. *United States,* D. C. S. D. N. Y., 94 F. Supp. 952.

All the courts involved in the *Porello* case assumed that the indemnity clause was part of a maritime contract to be construed in accordance with federal admiralty principles and not the state law which might apply under the usual conflicts of laws rules. But in the case at bar the District Court came to an opposite conclusion and construed the indemnification provision under the law of New York, the place of contracting, because of the later decision of the Supreme Court in *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310, holding that a maritime insurance policy must be construed under the law of the state where made. The New York rule, developed in nonadmiralty cases, appears to bar any recovery under an ambiguous indemnity provision or at least requires a strict construction of the agreement against the indemnitee. *Mostyn* v. *Delaware, L. & W. R. Co.*, 2 Cir., 160 F. 2d 15, 19, certiorari denied 332 U. S. 770; *Semanchuck* v. *Fifth Ave. & Thirty-Seventh St. Corp.*, 290 N. Y. 412, 49 N. E. 2d 507; *Thompson-Starret Co.* v. *Otis Elevator Co.*, 271 N. Y. 36, 2 N. E. 2d 35. This rule, coupled with the Supreme Court's characterization of an identical indemnity provision as ambiguous, *American Stevedores, Inc.* v. *Porello, supra,* 330 U. S. 446, led the District Court here to dismiss Mowinckels' petition. Wisely, the Court went further, however, and heard evidence of

intent in case we concluded that the Wilburn Boat rule was inapplicable to the contract at bar. It determined that the evidence of intent submitted by Commercial was unpersuasive and that if federal, and not state, law applied, Mowinckels would be entitled to indemnification under the decisions in *Porello* v. *United States, supra*, D. C. S. D. N. Y., 94 F. Supp. 952, and *Muratore* v. *United States*, D. C. S. D. N. Y., 100 F. Supp. 276

A careful consideration of the *Wilburn Boat* case requires the conclusion that the Court intended to deal only with the limited area of maritime insurance and did not fashion a rule applicable to the maritime contract here involved. The provision in Art. III, § 2, of the Constitution extending the judicial power of the United States to "all cases of admiralty and maritime jurisdiction," although silent as to the substantive law to be applied, has resulted in the application of a large body of general (or federal) maritime law, much of which has been created by federal courts sitting in admiralty. Where states have sought to enter the field by statute their efforts usually have been thwarted as infringements of a field reserved to Congress and the federal courts by the Constitution and as interferences with the uniformity requirements of the maritime law. See, e.g., *Southern Pac. Co.* v. *Jensen*, 244 U. S. 205, and Gilmore & Black, The Law of Admiralty, 43-46 (1957). Thus in the area of maritime torts, *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, clearly indicates that state law is irrelevant in determining liability for injuries to maritime workers. And in the field of maritime contracts generally, the cases are clear that in most situations federal, and not state, principles apply to determine the respective rights and duties of the parties. In fact the Supreme Court only recently discussed the implied promise of a stevedore to indemnify a shipowner for foreseeable damages resulting from the stevedore's breach of its implied warranty of workmanlike performance, *Ryan Stevedoring Co.* v. *Pan-*

Atlantic S. S. Corp., 350 U. S. 124; *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, and made no mention of state rules which either create or condition this liability. Obviously, therefore, the Court considered that these problems are governed solely by federal maritime principles. In this setting we examine the *Wilburn Boat* case.

The case concerned the effect to be given to the breach by petitioners of certain terms or warranties contained in a fire insurance policy issued on petitioners' boat. The policy contract was made and delivered in Texas, and under Texas law it was questionable whether the breaches of warranties rendered the policy unenforceable. The District Court and the Court of Appeals, however, held that the insurance policy was a maritime contract and therefore that Texas law was inapplicable. Further they held that under "established" admiralty rules any breach of a policy warranty barred recovery; thus judgment was rendered for the respondent insurance company. At the outset of its opinion, the Supreme Court stated that "(t)his case raises questions concerning the power of States to regulate the terms and conditions of marine insurance contracts." *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310, 311. After finding no judicially established admiralty rule governing such warranties the Court considered whether it should fashion one under its admitted power to do so. It then reviewed the judicial and legislative history of insurance regulation in the United States and concluded that this "warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties." 348 U. S. 310, 316.

Numerous factors impelled the decision thus indicated. For instance the Court said that "(t)he control of all types of insurance companies and contracts has been primarily a state function since the States came into being." *Ibid.* Further it showed that, even though *United States* v. *South-*

Eastern Underwriters Ass'n, 322 U. S. 533, established that Congress has the power to regulate interstate insurance transactions, Congress clearly declared by statute that "the continued regulation of insurance by the States is in the public interest, and that silence on the part of Congress should not be construed to impose any barrier to continued regulation of insurance by the States." 348 U. S. 310, 319. Moreover, "(t)he vast amount of insurance litigation in state courts throughout our history also bears witness that until recently state legislatures and state courts have treated marine insurance as controlled by state law to the same extent as all other insurance," and "(n)ot only courts, but Congress, insurance companies and those insured have all acted on the assumption that States can regulate marine insurance." 348 U. S. 310, 317. Finally, in the Court's view, Congress, and not the Court, is best suited to replace state regulation of marine insurance with a comprehensive act if that be desired. Thus it decided that "(w)e, like Congress, leave the regulation of marine insurance where it has been—with the States." 348 U. S. 310, 321.

Clearly the Court was balancing two divergent considerations—the continuance of traditional state power to regulate all kinds of insurance, including maritime insurance, as against the desirability of uniform admiralty rules. In our view the Court did not intend to rule on the propriety of state regulation of other types of maritime contracts. See Gilmore & Black, The Law of Admiralty 63 (1957). This conclusion is amply supported by the Court's treatment of a later case, *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85, which involved the validity of a contractual provision exempting a towboat owner from liability for negligence. There the Court alluded to no state rules and decided the case solely on federally created maritime principles. We believe, therefore, that the Court in the *Wilburn Boat* case did not intend to change its original decision evidenced in *American Stevedores, Inc.* v. *Porello, supra,*

330 U. S. 446, that the indemnity provision now under consideration is governed by admiralty rules.[1]

Hence our construction of an identical indemnity clause in *Porello* v. *United States*, *supra*, 2 Cir., 153 F. 2d 605, to require indemnification, even though the indemnitee was also at fault, must control here in view of the similarity of facts. In both cases the shipowner created a potentially dangerous situation and the stevedore, after notice, failed to take the necessary steps to avoid injury, although it was under duty to do so. We said in the *Porello* case that "(a)lthough the stevedore's default in that respect might not relieve the shipowner from liability to the injured workman, it would make it reasonable for the shipowner to insist that the stevedore alone bear the loss, and the quoted provision (the indemnity clause) was inserted in the contract for that purpose." 155 F. 2d 605, 608.[2] The same reasoning applies here: and we believe, as did Judge KAUFMAN upon the remand of the *Porello* case, that, in the absence of evidence of intent to the contrary, it controls.

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[1] Commercial argues that our decision in *Jarka Corp.* v. *Hellenic Lines*, 2 Cir., 182 F. 2d 916, 919, requires that all stevedoring contracts, although maritime in nature, are to be construed in accordance with applicable state law. But that case involved whether or not a written offer to modify a contract term (the rate to be charged for loading hay) bound the offeror in the absence of consideration. A New York statute provided that such options were binding and we decided that "even in its greatest ascendancy the Jensen rule (*Southern Pac. Co.* v. *Jensen*, 244 U. S. 205) would not have prevented application of such a state statute as this, which regulates a matter in which uniformity is not necessary and which is not "in conflict with any essential feature of the general maritime law." Here, of course, the very provision under consideration already has been construed according to admiralty principles. Moreover, the need for uniform application of indemnity rules is well illustrated by the recent cases involving the liability of a stevedore for the breach of its implied warranty of workmanlike performance. *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124; *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U. S. 563.

[2] In fact the admiralty and New York rules governing this situation are not totally dissimilar. In *Rice* v. *Pennsylvania R. Co.*, 2 Cir., 202 F. 2d 861, 862 (an admiralty case), Judge SWAN, writing for the majority, stated that "(w)ith the generally accepted rule that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms, we are in complete accord." Judge SWAN, of course, also wrote for the court in the *Porello* case, where the provision now under consideration was found clear under the circumstances, absent probative evidence of intent to the contrary.

Here the trial court also came to the same conclusion, holding that if federal law applies Commercial is liable to Mowinckels under the provision.

The parties vigorously contest Commercial's liability under its implied warranty of workmanlike performance. *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp., supra,* 350 U. S. 124; *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., supra,* 355 U. S. 563. But we do not reach that issue because we decide that Commercial must indemnify Mowinckels under the express provision in their contract. Mowinckels is entitled to recover not only the amount paid Amador, but also its reasonable attorneys' fees, costs, and expenses in defending against his claim. *Shannon* v. *United States,* 2 Cir., 235 F. 2d 457, 459.

Decree reversed for entry of decree for petitioner.

UNITED STATES COURT OF APPEALS,

For the Second Circuit.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the fifth day of June, one thousand nine hundred and fifty-eight.

Present:

Hon. Charles E. Clark,
Chief Judge.

Hon. J. Edward Lumbard,
Circuit Judge.

Hon. Edward J. Dimock,
District Judge.

Manuel Amador,
Libellant,

v.

M/S Ronda & A/S J. Ludwig Mowinckels Rederi,
Petitioner-Appellant,

Commercial Stevedoring Company, Inc.,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed for entry of a decree for appellant in accordance with the opinion of this court; with costs to the appellant.

A. DANIEL FUSARO,
Clerk.